

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2311

To be argued by
THOMAS E. ENGEL

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-2311

UNITED STATES OF AMERICA,

Appellee,

—v.—

AMADEO AUGUSTO LUCIANO SANTELISES,

Defendant-Appellant.

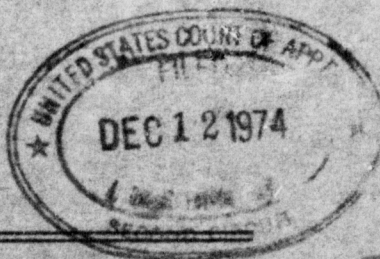
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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AMADEO AUGUSTO LUCIANO SANTELISES,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Amadeo Augusto Luciano Santelises appeals from an order entered on July 30, 1974, in the United States District Court for the Southern District of New York, by the Honorable Charles H. Tenney, United States District Judge, denying his petition, filed pursuant to Title 28, United States Code, Section 1651, to vacate his 1966 conviction for violations of Title 18, United States Code, Section 1546, charging him with fraud in connection with the preparation, possession and use of immigration papers.

Statement of Facts

On July 16, 1965, Amadeo Santelises, a citizen of the Dominican Republic residing in the United States, was charged in a 27 count indictment with various offenses pertaining to the preparation and use of false immigration documents. Counts 1-17 charged Santelises with making and using false and fraudulent documents in an immigration proceeding in violation of Title 18, United States Code, Sections 1001, 3238 and 2. Counts 18-20 charged Santelises with fraudulently procuring and misusing visas and other entry documents in violation of Title 18, United States Code, Sections 1546 and 2. Counts 21-27 charged that Santelises aided and abetted the making of false affidavits on behalf of an alien in violation of Title 18, United States Code, Sections 1015 and 2.

On December 27, 1965, Santelises appeared with his counsel and pleaded guilty to Counts 1-8, 18, 19, and 21-24. On January 28, 1966, the petitioner was sentenced to concurrent one-year terms of probation. No appeal was taken from the judgment of conviction. The term of probation was completed satisfactorily.

On June 9, 1966, the Immigration and Naturalization Service of the Department of Justice commenced deportation proceedings against Santelises pursuant to the provisions of Title 8, United States Code, Section 1251(a)(5), which authorize, *inter alia*, the deportation of any alien who has been convicted of violating 18 U.S.C. § 1546 (Counts 18 and 19) and in October 9, 1967, after a hearing, he was ordered deported.

On April 10, 1972, Santelises filed a petition in the United States District Court for the Southern District of New York to set aside his plea of guilty to Counts 18 and 19. The District Court dismissed the petition, holding that Santelises' claim that his guilty plea, entered before Rule

11 of the Federal Rules of Criminal Procedures required the defendant to be advised of the consequences of his plea, was not rendered involuntary by reason of his not having been informed by the Court or his counsel that his conviction might cause his deportation.

The order was affirmed, *United States v. Santelises*, 476 F.2d 787 (2d Cir. 1973), on the ground that the District Court's failure to advise petitioner of the possibility of deportation under the then existing provisions of Rule 11 was not a violation of due process and that the petition was otherwise without merit. The Court noted that there was no allegation that Santelises' counsel had misled him and that no claim of ineffective assistance of counsel had been established. As an independent ground for affirmance, *id.* at 790 n. 3, this Court noted that Santelises had failed to submit an affidavit of counsel corroborating his allegation that he was unaware that deportation was a possible consequence of his plea. *Grant v. United States*, 451 F.2d 931 (2d Cir. 1971).

Santelises then submitted a second petition pursuant to Title 28, United States Code, Section 1651 to the District Court and appended an affidavit from Robert Mitchell, Esq., the attorney who represented him at the time he entered his pleas of guilty. The District Court found that, except for this affidavit, the second petition did not differ materially from the earlier petition (App. A at 36). The affidavit represented that, prior to his entry of a guilty plea to Counts 18 and 19, Santelises had not been informed by his attorney that, because he was an alien, he might thereafter be subject to deportation (App. A at 35). Additionally, Mr. Mitchell stated that, to his knowledge, Santelises had not been aware of such a consequence at the time he pleaded guilty.

The District Court again rejected Santelises' claim, on two grounds: (1) Santelises' claim of ignorance of the possibility of deportation resulting from his plea is legally insufficient to attack his plea, and (2) the failure of Santelises' lawyer to advise him of the possibility of deportation does not amount to a denial of effective assistance of counsel because there was no affirmative misrepresentation made by his counsel (App. A. 39-40).

ARGUMENT

The District Court properly ruled that Santelises' challenge to his 1966 conviction was without merit.

The only claim raised on this appeal is that Judge Tenney erred in denying Santelises' petition accompanied, as it was on this occasion, by an affidavit by his lawyer that he did not advise Santelises that he might be deported as a result of his plea to Counts 18 and 19 of the 1965 indictment. This claim, in view of this Court's opinion in *United States v. Santelises*, 476 F.2d 787 (2d Cir. 1973), is frivolous.

In *Santelises*, this Court affirmed the District Court's dismissal of the petition, holding that the District Court's "mere failure to warn a defendant of the possibility of deportation as a consequence of his plea does not, without more, amount to a violation of constitutional due process, thereby rendering the plea invalid." 476 F.2d at 789. See also *Michel v. United States*, Dkt. No. 74-2198 (December 2, 1974). The Court also held that, in the absence of allegations that Santelises' counsel had affirmatively misled him about the consequences of his plea, his counsel's failure to warn him that his conviction might lead to his deportation did not make out a claim of ineffective assistance of counsel. 476 F.2d at 789-790. Finally, the Court noted, 476 F.2d at 790 n.3, that the failure to submit an affidavit from his

counsel that Santelises was unaware that he might be deported was a further basis supporting the dismissal below.

As Judge Tenney properly concluded in his opinion below (A-37, A-39-A-40), the submission, on Santelises' second application, of Mr. Mitchell's affidavit reciting that he had not advised Santelises that his conviction could cause his deportation merely met the alternate ground of this Court's holding that the absence of such an affidavit authorized dismissal of the petition. But the fact that Mr. Mitchell agrees that he did not advise Santelises that he might be deported in no way affects this Court's holding that Santelises' unawareness that he might be deported did not render his plea involuntary. Nor does the submission of the affidavit undercut this Court's holding that Santelises "... has not made out any claim of ineffective assistance of counsel . . .", 476 F.2d at 790, since Santelises still makes no claim that Mr. Mitchell misled him and Mr. Mitchell's affidavit contains no such suggestion. Compare *Mosher v. LaVallee*, 491 F.2d 1346 (2d Cir.), cert. denied, 416 U.S. 906 (1974). See generally *Brady v. United States*, 397 U.S. 742, 756-758 (1970); *United States v. Yanishefsky*, 500 F.2d 1327, 1333-1334 (2d Cir. 1974).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York)

Thomas E. Engel being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 12th day of December, 1974
he served a copy of the within brief
by placing the same in a properly postpaid franked
envelope addressed:

Austin T. Fragomen, Jr.
Fried, Fragomen & Del Rey, P.C.
515 Madison Avenue
New York, New York 10022

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

THOMAS E. ENGEL

Sworn to before me this

day of

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975